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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS SANTANA,

Defendant and Appellant.

In re JUAN CARLOS SANTANA,

on Habeas Corpus.

B286320

(Los Angeles County
Super. Ct. No. KA115259)

B293414

(Los Angeles County
Super. Ct. No. KA115259)

APPEAL from judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed and remanded. Petition denied.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, J. Michael Lehamann and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Carlos Santana appeals his convictions for burglary, receiving stolen property, and second-degree murder, along with true findings for personal use firearm enhancements. He raises several challenges to his conviction and sentence. We reject his argument advanced in his direct appeal and in an accompanying petition for writ of habeas corpus that his trial counsel violated his Sixth Amendment right to the assistance of counsel pursuant to *McCoy v. Louisiana* (2018) __ U.S. __, 138 S.Ct. 1500 (*McCoy*).

In *McCoy*, the United States Supreme Court held defense counsel violated the defendant's Sixth Amendment right by strategically conceding guilt in a capital trial when the defendant vociferously insisted he was innocent throughout the case and objected to counsel's concession. Here, Santana's counsel conceded in closing argument Santana was guilty of burglary, receiving stolen property, and second-degree murder, but urged the jury to acquit him of first-degree murder and to find the personal use firearm enhancements not true. He did not consult Santana before taking that course, believing it was a strategic choice within his control. But unlike in *McCoy*, nothing in the record shows Santana sought to maintain his innocence in a way that conflicted with his counsel's decision to concede his guilt to some charges. Thus, despite the lack of consultation, nothing demonstrated counsel's concession overrode Santana's objectives. On this record, we find no Sixth Amendment violation.

We reject Santana’s remaining challenges that the trial court erroneously admitted evidence pertaining to gunshot residue; insufficient evidence supported his murder conviction and firearm enhancements; and the trial court inadequately addressed juror complaints that someone in the courtroom had photographed them. We also reject Santana’s due process challenge to his ability to pay fines and fees based on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), but find resentencing proper in light of Senate Bill No. 620 (2017–2018 Reg. Sess.), which made the imposition of firearm enhancements discretionary. Thus, we affirm the convictions but remand for resentencing. We deny Santana’s petition for writ of habeas corpus.

PROCEDURAL BACKGROUND

Santana and his son Andres¹ were charged with burglary (Pen. Code, § 459),² receiving stolen property (§ 496, subd. (a)), and murder (§ 187, subd. (a)). For the murder count, several personal firearm use enhancements were alleged. During trial, Andres pled no contest to voluntary manslaughter. A jury convicted Santana of second-degree burglary, felony receiving stolen property (with a finding the value of the property exceeded \$950), and second-degree murder, acquitting him of first-degree murder. It found the personal use firearm enhancements true. Santana was sentenced to 43 years to life and was ordered to pay various fines and fees.

¹ We refer to Andres and others by first name to avoid confusion.

² All undesignated statutory citations refer to the Penal Code.

Santana appealed. Following the issuance of *McCoy*, Santana filed a petition for writ of habeas corpus, raising a single challenge to his convictions based on *McCoy*. We received an informal response and informal reply. We consolidated his direct appeal and habeas petition for purposes of argument and opinion.

FACTUAL BACKGROUND

This case arose from the shooting death of Patricia Salva in her home. In the days after her death but before her body was discovered, Santana, Andres, and Santana's girlfriend Debbie Curiel returned to Salva's home to steal various items, many of which were recovered from Santana's car or his ex-wife's house. According to defense counsel's concessions during closing argument, the evidence demonstrated Santana's guilt on burglary, receiving stolen property, and second-degree murder, but the evidence did not demonstrate Santana was the shooter or acted with premeditation.

1. Santana's Background Prior to the Murder

Santana divorced his ex-wife Daisy in July 2016; they had four children together, including Andres. Santana had moved out of their home years earlier, in September 2013. Their son Andres moved in with Santana shortly thereafter. Santana had only paid less than two months of child support—November and December 2014, which was after his arrest in this case.

Santana was arrested a few times in mid-2014 before the murder, including an arrest resulting from a gunshot. At the time, he owned a silver semiautomatic firearm that was confiscated as a result of the incident; it was the only gun Daisy had ever seen him possess. This arrest led him to be placed on

administrative leave by his employer, and he was not working. Daisy was aware Santana kept a firearm at his parents' house.

On October 4, 2014—less than two weeks before Salva's murder—Santana and Andres went to Daisy's house and she saw Santana place a gun in a backpack worn by Andres. The gun was a black revolver with brown handgrips. She told Andres he could not come in the house with a gun, and both he and Santana denied knowing what she was talking about. Santana got upset and the two of them left. That was the only time Daisy saw Santana with a revolver.

Two days later on October 6, 2014, Santana threatened to commit suicide in text messages to Daisy, then he went to her work to drop off some papers and his wallet for Andres. He asked to see their other two children at Daisy's house, and Daisy agreed.

Later, Daisy arrived home to find Santana on her front porch. She confirmed she was not going to end the divorce proceedings and went inside. She heard a gunshot. She looked outside and saw the tail end of his car as he was leaving. She tried to call him but could not reach him. Andres could not reach him either. She reported the incident to police and received a restraining order against Santana the next day.

Later that night, Daisy received text messages from an unknown number saying: "I don't know what kind of woman you are, you know, doing this to your husband. He cares so much for you and everything. You know, I have no respect for you. Your son and my husband are out there trying to look for him. I just hope that he's okay." The number belonged to Curiel, Santana's girlfriend.

As will become relevant later, as of August 2013 Santana had leased a blue Mini Cooper. Around late September or early October 2014, appellant drove a red Mini Cooper because his blue Mini Cooper was being serviced.

2. Victim Salva's Background and Santana's Interactions With Her

Salva lived alone and suffered from health and mobility issues. In her house, she kept thousands of dollars, savings bonds, and jewelry in a jewelry bag. Around October 12, 2014, she had been given \$700 to \$1000 in brand new one-hundred-dollar bills.

For two years before the murder, Curiel lived with Salva in exchange for performing household tasks. There was tension between Salva and Curiel, and at some point Salva told Curiel to leave. Curiel did not have a car and never parked one at Salva's house.

Salva's neighbors sometimes saw Santana and Andres at Salva's house, even though Curiel was not permitted to have guests. Aurelia H. lived across the street and saw Santana approximately five times in October, sometimes with Andres. Salva's next-door neighbor Angelica P. began seeing Santana and Andres about a month before the murder. Angelica's husband Jose saw Santana and Curiel regularly drinking in front of Salva's home at 5:00 a.m. when he left for work. He also saw Andres at least a couple of times.

Six days before the murder on October 10, 2014, a police officer was sent to Salva's home to keep the peace for a property exchange. He spoke with Curiel, who was sitting in a Mini Cooper nearby, and he spoke with Salva. He advised Curiel to return on an agreed date. The officer returned two days later on

October 12, 2014, and observed Curiel standing next to a gray pickup truck occupied by two men. Curiel entered the residence and began retrieving items with the help of the two men. Salva seemed upset and angry, calling Curiel “a thief and a liar.” After approximately 20 minutes, the officer left while Curiel and the men were inside the house.

At some point before October 12, 2014, Salva’s next-door neighbors Angelica and Jose were awakened during the night by the sound of something shattering. After going outside, Angelica saw a red Mini Cooper and heard someone say, “Dad, hurry, hurry.” At trial Angelica did not remember if she saw the person referred to as “Dad” get in the car, but she had previously testified she saw Santana and Andres get in the car and drive away. On October 12, 2014, a friend of Salva’s noticed a broken window in her home in the room where Curiel was staying.

3. Events Surrounding Salva’s Murder and Burglary of Her Home

Salva was last seen alive the evening of Thursday, October 16, 2014. Several people had seen her in the preceding days. Two days prior on Tuesday, October 14, 2014, her son had spoken to her on the phone. Her daughter had lunch plans with her the next day October 15, 2014, but Salva did not show up or answer any calls that day or the next day. However, Salva’s neighbor across the street Aurelia, saw Salva at 10:00 a.m. that day. Salva’s friend also received a notification of a voicemail from Salva that evening, although the friend was unable to retrieve it.

The last person to see Salva alive was a neighbor, who saw her sometime between 6:10 and 7:30 or 8:00 p.m. on most likely Thursday, October 16, 2014, although it could have been a

Wednesday. He saw her standing near her car with Curiel and a man. She seemed upset and looked mad but told the neighbor “Everything’s good, mijo.” The neighbor had previously testified it appeared “like there was tension, probably just arguing.”

The night of October 16, 2014, Santana, Curiel, and a third person named Sara Morales burglarized Salva’s house. Morales was a friend of Curiel’s niece. She got high on methamphetamine with Santana, Curiel, and Curiel’s brother Vincent Fonseca. At some point, Santana asked Morales if she wanted to go help Curiel move and steal some items from her old residence. Morales agreed, and around 10:00 or 11:00 p.m. the three drove Santana’s Mini Cooper to Salva’s house. After they entered through the open garage, Santana and Curiel told Morales to grab whatever she could. She took makeup, costume jewelry, and bathroom items. She also collected bank records and saw Curiel take bank records. Santana and Curiel also took a television. At some point, Morales saw a covered body lying face-down in the den and smelled an “incredible stench” of a dead body. The trio left and returned to Fonseca’s residence, placing the stolen television in Fonseca’s living room. Santana, Curiel, and Andres also brought some bags of clothing to Fonseca’s residence.

On Friday, October 17, 2014, Angelica noticed Salva had not taken her trash bins out to the curb, which was unusual. That night, Aurelia saw Santana in the neighborhood, and he seemed “sweaty, like nervous.” At a nearby liquor store, she saw him on the phone and then get into a Mini Cooper driven by Andres.

The owner of the liquor store saw Santana that night as well. He appeared “frustrated a little bit” and “dusty.” He entered the store in a hurry, walked quickly, was out of breath,

and was sweating. He asked to use the phone, and when the owner asked why, he said, “My stupid son [was] supposed to wait for me in front of the house and he took off.” The owner lent him his cell phone, which Santana used outside. The owner heard him yell “stop” multiple times. A light blue Mini Cooper stopped, and Santana threw the phone back to the owner and got in the car.

When Aurelia returned home, she spotted the Mini Cooper drive slowly in front of Salva’s house then turn around and drive by again. Santana was driving and Andres was the passenger.

On the morning of October 18, 2014, Santana and Morales returned to Salva’s house and stole more items. Santana carried out a box of beer and a bag. Aurelia saw him and a red-haired woman she did not know (Morales) arrive in the Mini Cooper. She saw Santana enter the garage and later leave with a 30-pack of Bud Light and some grocery bags. Angelica and Jose also saw Santana leave Salva’s house with a case of beer and bags. Aurelia called the police.

Detectives arrived at Salva’s house and found the garage door open and no signs of forced entry. They found Salva’s body lying face-down on the floor and smelled the odor of decomposing human remains. The family room and one bedroom appeared ransacked. In a different bedroom packed with items, two or three cases of beer were found. In another mostly empty bedroom, the window was broken. No bullet casings were found.

The evening of October 18, 2014, Andres left a bag containing boxes of jewelry at his mother Daisy’s house for his sister. Santana later asked his daughter if she liked the jewelry and claimed he got it from a store. Morales identified the jewelry as resembling the jewelry stolen from Salva’s house. Daisy

identified a necklace as one left for her daughter and a ring Santana had given her in late September or early October. Salva's daughter identified the ring as Salva's wedding ring.

4. Arrest and Recorded Statements After Arrest

Santana, Andres, and Curiel were arrested on October 19, 2014. During their transport to jail in a transport van, their conversation was recorded. They discussed getting rid of two objects in Andres's sock. After Santana and Curiel said "they" were going to take off Andres's shoes and socks, Santana suggested to put "it" in his sock, and Andres suggested putting "'em" in Curiel's bra. Andres said he "forgot" and was "going to put them in the car." Santana said, "Deny, deny, deny," and later, "I have my fingerprints on them. I'm gonna wipe 'em. Unless you get it with the shirt, wipe them."

Curiel commented that "[t]hey" were following the three of them for three hours. Andres said, "That means that . . . (unintelligible)." Santana told him to "[s]hut the fuck up" and said, "We shot it and then they found it, you think they'd (unintelligible)." Curiel responded, "I don't know why you shot it."

Later, Santana said "go to your back. We should fall out the fuckin' window." The following exchange took place:

"[Curiel]: Where's the other one?"

"Andres: Right there.

"[Santana]: Try it on the other side.

"Andres: (Unintelligible).

"[Curiel]: Try and get it over here.

"[Santana]: Turn your hands—put your hands up, put your hands up.

"[Curiel]: Give me that, hurry, hurry.

“[Santana]: (Unintelligible).

“[Curiel]: Did they fall off?

“Andres: I don’t know.

“[Santana]: You don’t know?

“Andres: They fell in some kind of metal thing. They didn’t fall back.

“[Santana]: (Unintelligible).

“[Curiel]: They go in the—

“Andres: They didn’t fall . . . (unintelligible).

“[Curiel]: They go in the . . . (unintelligible).

“Andres: Yeah.”

They also coordinated their explanations for how Curiel received a television and how they had two money orders for \$1,000 that “didn’t work.” They discussed their cell phones, and Santana said, “I hope you erased everything.” Andres said, “Hey, my cell phone has text messages on it. So do I just say I gave it, I let you borrow it and that’s it?” Curiel said, “I deleted all my shit.” Santana repeated, “[D]elete everything.”

Detectives listened to the recording and heard a metallic sound like a firearm cartridge casing being discarded in the van. After a search of the van about a year and a half later, they found two cartridge cases behind a loose panel.

5. Post-Arrest Investigation

An autopsy revealed Salva was shot twice—once in the left chest and once in the left mid-back—and both were fatal. Two bullets recovered from her were fired from a revolver, either .38 special or .357 magnum caliber. A photograph from Santana’s cell phone showed what appeared to be a Colt revolver in his Mini Cooper, which resembled the gun Daisy saw him place in Andres’s backpack. The bullets recovered from Salva’s body

could have come from a Colt revolver, and the cartridge cases found in the police van were .38 specials, consistent with the recovered bullets. The cases and the bullets had the same manufacturer.

No money was found in Salva's home after her death. Two fairly new one-hundred-dollar bills were found in Santana's Mini Cooper.

Many items from Salva's residence were recovered from Santana's car—savings bonds, personal checks with signatures that were not hers, a bank card with her son's name, her driver's license, and her daughter's expired driver's license. At Fonseca's residence, police recovered Salva's television and a gold watch, as well as women's jewelry, makeup, other watches, rings, and a bag of tools.

Andres's cell phone contained several incriminating items. It contained search history for "Calculate the value of your paper savings bonds" and "Individual redeeming cashing in EE/E savings bonds." It also contained text messages from late September and early October about Andres purchasing a gun. He texted his brother on October 5, 2014, saying, "Father said thank you for telling mother about the gun he was selling, which she thinks I carry with me. It's sold already. You know some of us have to make money. We don't depend on mommy and grandma to feed us. We pay our own bills."

The same day Andres received a text message from an individual saying, "Hey can you tell your dad that I can't do it and that I'm sorry, but I can't risk getting caught," to which Andres responded, "Yeah." Right after that Andres texted another individual saying, "My father will get you the fake I.D. It's going to have a different name, and all you would have to do

is cash a check with the I.D. I can't do it because we need a girl." The individual said she was not comfortable with that, and Andres answered, "That's fine. I'll let him know . . . In all honesty, this is some sketchy stuff and I wouldn't recommend you do anything my father asks." A detective explained this exchange indicated Andres had a stolen check made out to a woman and he wanted to cash it.

On October 7, 2014, Santana sent a text message to Andres saying, "Bring my piece from the side door driver side." "Piece" meant gun.

On October 16, 2014—the day of the murder—Andres texted Curiel to say, "Father said to turn off GPS things on the phone and iPod." The message was later deleted.

Two days after the murder on October 18, 2014, Santana searched for "Luciano Salva" on his phone, which is the name of Salva's son. At 1:17 p.m. on the same day, one of the seized cell phones sent a text message reading, "Tell Andre the gun is under his seat." The message was later deleted.

6. Gunshot Residue Expert Testimony

Criminalist Kristina Fritz tested a gray shirt and pair of jeans from Santana for gunshot residue (GSR). On the shirt, she found seven GSR particles and three particles consistent with GSR. On the pants, she found four GSR particles and 10 particles consistent with GSR. She concluded the items of clothing were in an environment of GSR. Neighbors saw Santana wearing a gray shirt and jeans on the morning of October 18, 2014.

Fritz also sampled clothing from Andres and found GSR particles and particles consistent with GSR, opining the clothes were also in an environment of GSR. She sampled clothing from

Curiel but found no GSR particles. She could not opine on whether the presence of GSR was a direct result of a firearm discharge or transfer from the environment.

Fritz reviewed a report from Andres's defense GSR expert Bryan Burnett, who relied on several sources to raise the possibility of GSR contamination other than from the shooting at issue. Two of the cited studies concluded that the likelihood of GSR in the law enforcement environment is low. Further, while the FBI stopped conducting GSR testing in 2006, it did so to shift resources, not due to testing problems. Burnett also cited a "listserv" post, but he was no longer a member of the listserv after improperly posting information from an active case and altering posted data.

Finally, Fritz discussed a Los Angeles County Coroner's office study finding GSR particles in the back seats of four patrol cars of the 50 cars tested and GSR-consistent particles in 45 of 50 cars tested. Another study sampled 43 non-shooting uniformed police officers after their shifts and found three with GSR particles on their hands and half with GSR-consistent particles on their hands.

7. Defense GSR Expert

Andres called Burnett as a GSR expert in his defense case. Burnett opined that the source of the GSR on Andres's clothing was inconclusive because Andres could have picked it up while being processed in the police environment. He agreed with most of Fritz's GSR report, including that the incidence of secondary transfer is low. He also acknowledged his Scanning Electron Microscope could not conduct the automated analysis done in the Los Angeles Sheriff's Department lab.

DISCUSSION

I. Defense Counsel's Concession of Santana's Guilt on Some Counts Did Not Violate His Right to Counsel

Relying on *McCoy*, Santana asserts two challenges to his convictions: (1) the record does not show he knowingly and voluntarily waived his constitutional rights before defense counsel conceded his guilt on some of the charges; and (2) even absent an express waiver, his counsel's concessions violated his right to make decisions about his own defense. A careful review of the case law and record leads us to reject both arguments.

Background

At trial, Santana's defense counsel Charles Lindner did not give an opening statement and Santana did not testify. In closing argument, Lindner conceded Santana's guilt for burglary, receiving stolen property, and second-degree murder, and even argued the evidence showed Santana was guilty. For burglary, he told the jury, "My client is guilty of count 1." He continued, "Do you really expect me, in decency, to convince you that my client didn't go inside the house, didn't take the stuff from over the dead body, didn't stick it in his car, didn't bring it over to [Curiel's] brother's house and stash it? If I make those arguments to you, you're going to go, sleazebag. Because I will be. I will not have told you merited truth. So I'm going to tell you what the D.A. has proven and what she hasn't, and then we'll see where that leaves you." He argued the eyewitness testimony of Santana leaving Salva's house with the case of beer and bag was "direct evidence, eyeball evidence, of a burglary."

For murder, he told the jury, "there is more than sufficient evidence to tell you, in my capacity as the guy at the end of the assembly line, that my client appears to be either directly or as

an aider and abettor guilty of second-degree murder.” He later argued, “I’m telling you that I think the case is there for second-degree murder I’m telling you what I believe to be the truth.”

Toward the end, he summarized, “I’m basically telling you to convict my client of felony burglary, felony receiving stolen property, and second-degree murder.”

Lindner’s strategy was to argue the evidence did not support first-degree premeditated murder or that Santana was the shooter in order to support the personal use firearm enhancements. The strategy partially worked, and the jury acquitted Santana of first-degree murder but found the personal use firearm enhancements to be true.

The record on direct appeal does not disclose whether Lindner spoke to Santana about these concessions before closing argument or whether Santana disagreed with his proposed strategy. The direct appeal record also contains no indication Santana raised any objection to the trial court or to Lindner after closing arguments were completed or during sentencing.

After *McCoy* was decided, Santana filed a petition for writ of habeas corpus challenging Lindner’s concessions on Sixth Amendment grounds pursuant to *McCoy*. In support of the petition, Santana submitted a short declaration, stating: “I was surprised when my trial attorney, Charles Lindner, told the jury to convict me of the charges of burglary, receiving stolen property, and second-degree murder. I expressed my frustration to Mr. Lindner afterwards.” He attested Lindner never informed him of the decision beforehand, and he did not consent to the strategy. He stated if Lindner had told him beforehand he

planned to admit those charges, “I would have objected and told him not to admit the charges.”

Lindner also submitted a declaration. He explained his objective was to prevent a first-degree murder conviction and a true finding on the firearm enhancements. His decision was based in part on *Florida v. Nixon* (2004) 543 U.S. 175 (*Nixon*), as well as “CACJ and CPDA seminars that addressed when concessions can be strategic.” He attested: “When I returned to defense table after arguing, my client (defendant) leaned over and said, ‘Why didn’t you argue that I was innocent?’ I explained that arguing for his innocence in light of the evidence arrayed against him would, in my professional opinion, get him convicted of first degree murder and explained my reasoning. Defendant did not have the opportunity to instruct me.” Lindner further attested he never obtained permission from Santana to concede his guilt, and “I assumed I was ‘in control’ of courtroom tactics, not defendant.” He believed he should have asked Santana before making his argument and his concession violated Santana’s Sixth Amendment right pursuant to *McCoy*.

Analysis

In *McCoy*, the United States Supreme Court held the Sixth Amendment right “‘to have the Assistance of Counsel for his defence’” gives a defendant the “right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.” (*McCoy, supra*, 138 S.Ct. at p. 1505, italics omitted.) Thus, “[w]ith individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to

maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.” (*Ibid.*)

The issue arose in *McCoy* because the defendant “vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt.” (*McCoy, supra*, 138 S.Ct. at p. 1505.) At the outset of his case, he pleaded not guilty to the charges, and throughout the proceedings, he maintained he was out of state at the time of the killings at issue and corrupt police killed the victims when a drug deal went wrong. (*Id.* at p. 1506.) When told two weeks before trial his counsel intended to concede his guilt as the only possible way to avoid the death penalty, the defendant was “furious”; he told his counsel not to make the concession and pressed to pursue acquittal. (*Ibid.*) The defendant also sought to terminate his counsel, but the trial court denied the request. The defendant’s disagreement with his counsel’s strategy continued at trial when he protested his counsel’s concession strategy during opening statements and testified to his factual innocence. (*Id.* at p. 1507.) After the jury returned death verdicts, the defendant unsuccessfully moved for a new trial, arguing his trial counsel violated his rights by conceding his guilt. (*Ibid.*)

In finding the defendant’s Sixth Amendment right to counsel was violated, the court drew a line between trial management decisions reserved for the lawyer, such as “‘what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence,’” and decisions reserved for the client, “notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.” (*McCoy, supra*, 138 S.Ct. at p. 1508.) “Autonomy to decide that the objective of the defense

is to assert innocence belongs in this latter category.” (*Ibid.*) Thus, “[w]hen a client expressly asserts that the objective of ‘*his* defence’ is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.” (*Id.* at p. 1509.)

The court explained its holding should not displace counsel’s or the court’s trial management roles because “[c]ounsel, in any case, must still develop a trial strategy and discuss it with her client,” in order to “explain[] why, in her view, conceding guilt would be the best option.” (*McCoy, supra*, 138 S.Ct. at p. 1509.) In the particular facts in *McCoy*, the court explained defense counsel could not, after consultation, override the defendant’s objection or interfere with the defendant telling the jury he was innocent. (*Ibid.*)

The court distinguished *Nixon, supra*, 543 U.S. 175. In *Nixon*, the court rejected a claim of ineffective assistance of counsel after defense counsel conceded the defendant’s guilt in order to argue against a death sentence. Defense counsel tried to explain his proposed concession strategy to the defendant at least three times, but the defendant was unresponsive, neither verbally approving nor protesting the strategy, and he provided very little assistance in preparing his case. (*Id.* at p. 181.) The court held “[d]efense counsel undoubtedly has a duty to discuss potential strategies with the defendant,” but when “a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course.” (*Id.* at p. 178.)

The court in *McCoy* explained *Nixon* presented a different situation—the defendant in *Nixon* never asserted any objective

for his defense, so his counsel's decision to concede guilt did not override his objectives. Instead, "Nixon complained about the admission of his guilt only after trial. [Citation.] McCoy, in contrast, opposed [defense counsel's] assertion of guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court [Citation.] If a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest. Presented with express statements of the client's will to maintain innocence, however, counsel may not steer the ship the other way." (*McCoy, supra*, 138 S.Ct. at p. 1509; see *People v. Frierson* (1985) 39 Cal.3d 803, 815 (Kaus, J., plur. opn.) [counsel may not override defendant's "clearly express desire" to present only viable defense in guilt phase].)

Lindner's failure to consult with Santana before conceding his guilt may well implicate his competence as counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 688 [defense counsel owes duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"]; see *Nixon, supra*, 543 U.S. at p. 178.) But Santana's claim here is not that Lindner performed incompetently; his claim is that Lindner's concession violated his own autonomy to pursue his desired objectives. That issue is distinct from the effectiveness of counsel's performance. (See *McCoy, supra*, 138 S.Ct. at pp. 1510–1511 ["Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence."]; *People v. Eddy* (2019) 33 Cal.App.5th 472, 480 (*Eddy*) ["A violation of the client's right to maintain his or her defense of

innocence implicates the client's autonomy (not counsel's effectiveness) and is thus complete once counsel usurps control of an issue within the defendant's 'sole prerogative.' ”).³ While counsel's failure to consult a defendant could factor into this analysis, the ultimate question is whether the record reveals counsel's concession overrode the defendant's desired objectives.

The record in this case is silent as to Santana's objectives, so it falls closer to *Nixon* and compels us to reject his claim. Other than his not guilty plea at the outset of the case, Santana cites nothing in the record that his objective was to maintain his innocence (or pursue any other course of action) in conflict with Lindner's concession during closing argument. While true Lindner did not tell Santana of his planned concession strategy, even the defendant in *McCoy* claimed his innocence throughout the proceedings, including apparently before his counsel informed him of his strategy to concede guilt at trial. (*McCoy, supra*, 138 S.Ct. at p. 1506.) Nor did Santana testify to his innocence during trial, as did the defendant in *McCoy*. While he certainly had the right not to testify (see *Eddy, supra*, 33 Cal.App.5th at p. 483 [“we also find it unnecessary that defendant actually testify in his own defense in order to enjoy *McCoy*'s protection.”])), had he done so his testimony could have shed light on his desired defense objectives. And Santana has not indicated he had any other

³ Santana expressly argued in his habeas petition the analysis for prejudicial ineffective assistance of counsel is unnecessary. By doing so, he avoids the need to show prejudice, given *McCoy* held a violation of a defendant's Sixth Amendment autonomy right is “‘structural’; when present, such an error is not subject to harmless-error review.” (*McCoy, supra*, 138 S.Ct. at p. 1511.)

conflicts or disagreements with his counsel at any point suggesting his desired objectives and Lindner's strategy diverged.⁴

⁴ Interestingly, in their surprisingly thin declarations in support of the habeas corpus petition neither Santana nor Lindner state what Santana's objectives were in going to trial, let alone that his objectives were to maintain his factual innocence of all charges. Lindner admits only that he did not discuss the concession strategy with Santana; he does not state whether at any time he discussed Santana's objectives, what those objectives were, and whether he knowingly acted in conflict with Santana's stated objectives. Santana states that had they discussed the concession strategy, he would not have agreed to it. However, he, too, does not state his defense objectives and how counsel's concession strategy conflicted with those objectives. Both counsel and client seem to assume that a plea of not guilty sufficiently describes a defendant's defense objective. That, however, cannot be the case. As both bench and bar know, defendants enter pleas of not guilty and go to trial for many reasons, not just to prove their factual innocence of the charged offense or offenses. (*See, e.g., McCoy, supra*, 138 S.Ct. at pp. 1508–1509 [“although a concession of guilt might have been McCoy's best chance at avoiding the death penalty, the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.”].) A defendant may pursue a particular defense to protect a third party at all costs; indeed, here, Santana was charged along with his son Andres, which could have affected Santana's decision to plead not guilty for reasons unrelated to his factual innocence. A defendant may spurn a particular defense because of the stigma attached to it. A defendant may want to avoid being found guilty of a particular charge because of the punishment tied to that charge alone. Or a

Most telling, the contemporaneous trial record does not reflect Santana expressed any disagreement with Lindner's concession *after* Lindner presented it to the jury, which one would expect if Santana's objective truly diverged from Lindner's strategic choice. The only evidence of any sort of disagreement was contained in Santana's habeas declaration—submitted after *McCoy* was decided—indicating he expressed his frustration to Lindner at the time and would have objected to the concessions if he had been informed. Nothing in the trial record *at the time* corroborates his statements. Nor does Lindner's declaration close this evidentiary gap. Santana's question to him immediately after argument—"Why didn't you argue that I was innocent?"—could be interpreted two ways: either Santana, a lay defendant, was confused by Lindner's unconventional strategy, or Santana truly disagreed with the concessions and wished to maintain his innocence. We think the former interpretation is probably more reasonable, but even if this statement showed Santana did not agree with the tactic, there is no indication Santana's frustration lingered. In fact, Lindner stated he explained his strategy to Santana in response to his question, but conspicuously did *not* state Santana continued to express disagreement with the strategy even after being given this explanation.

This silent record is more akin to the *Nixon* defendant's failure to respond to defense counsel's contemporaneous attempts to explain the concession strategy, and far different from the

defendant may just want to put the prosecution to its burden of proof, regardless of outcome. Because we do not know on this record what Santana's defense objectives were, we cannot say counsel's concessions violated Santana's right to have them carried out.

McCoy defendant’s protestations of innocence and his vocal objections over defense counsel’s strategy before, during, and after trial. This was not a case in which Lindner was “[p]resented with express statements of [Santana’s] will to maintain innocence” but nonetheless “steer[ed] the ship the other way.” (*McCoy*, *supra*, 138 S.Ct. at p. 1509; see *People v. Franks* (2019) 35 Cal.App.5th 883, 891 [“*McCoy* makes clear, however, that for a Sixth Amendment violation to lie, a defendant must make his intention to maintain innocence clear *to his counsel*, and counsel must override that objective by conceding guilt.”].) Santana’s after-the-fact objections, raised for the first time after *McCoy*, simply do not convince us Lindner’s strategic decision to concede guilt for some of the charges overrode Santana’s desired objectives.

Our conclusion is consistent with recent cases applying *McCoy*. In *People v. Lopez* (2019) 31 Cal.App.5th 55 (*Lopez*), the court rejected a claim under *McCoy* when the defendant raised no objection in the trial court to his counsel’s strategy to concede guilt on a hit and run charge. (*Id.* at p. 66.) In *Eddy*, the court found a *McCoy* violation when defense counsel conceded the defendant’s guilt for voluntary manslaughter, after which the defendant objected at sentencing, maintaining his innocence, and moved for new counsel, expressing his disagreement with his counsel’s concessions. (*Eddy*, *supra*, 33 Cal.App.5th at pp. 477–478.) While the court rejected the argument the defendant could not show a Sixth Amendment violation because he did not object during closing argument, it explained the record “must show (1) that defendant’s plain objective is to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt.” (*Id.* at

p. 482.) The record here does not show either requirement. Finally, in *People v. Flores* (2019) 34 Cal.App.5th 270 (*Flores*), the court found a *McCoy* violation when defense counsel overrode the defendant's objections and expressed desire to maintain his innocence, and instead admitted the defendant was driving the car that seriously injured a police officer and conceded he possessed certain firearms. (*Flores*, at pp. 273, 280.)

We also reject Santana's argument that *Boykin-Tahl*⁵ waivers were necessary before Lindner could concede his guilt to certain counts. The law is clear a concession of guilt during argument is not the equivalent of a guilty plea requiring a knowing and voluntary waiver of constitutional rights. (See *Nixon, supra*, 543 U.S. at p. 188 [rejecting argument concession of guilt is the "functional equivalent of a guilty plea" requiring explicit acceptance by defendant]; *People v. Cain* (1995) 10 Cal.4th 1, 30 (*Cain*) ["We have held trial counsel's decision not to contest, and even expressly to concede, guilt on one or more charges at the guilt phase of a capital trial is not tantamount to a guilty plea requiring a *Boykin-Tahl* waiver."]; see also *People v. Lucas* (1995) 12 Cal.4th 415, 446; *People v. Griffin* (1988) 46 Cal.3d 1011, 1029.) While the court in *McCoy* placed a concession of guilt into the category of fundamental decisions reserved for a defendant like "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forego an appeal" (*McCoy, supra*, 138 S.Ct. at p. 1508), it did not *equate* it to a guilty plea requiring express waivers or cast doubt on these authorities. (See *Lopez, supra*, 31 Cal.App.5th at pp. 63–64

⁵ *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

[citing *Cain* to reject same *McCoy* argument].) As in Santana's case, "[i]t is not the trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach to presenting the defense." (*Cain*, at p. 30.)

Cited by Santana, we find *People v. Farwell* (2018) 5 Cal.5th 295 (*Farwell*) distinguishable. In *Farwell*, the California Supreme Court held a stipulation admitting all elements of a charged crime was tantamount to a guilty plea requiring a knowing and voluntary waiver of rights. (*Id.* at p. 300.) That was because the stipulation "conclusively established the stipulated facts as true and completely relieved the prosecution of its burden of proof." (*Ibid.*) The case here did not involve a stipulation of guilt. Instead, the jury was instructed the prosecution had to prove guilt beyond a reasonable doubt and the attorney's statements were not evidence. Thus, the prosecution was "still required to present 'competent, admissible evidence establishing the essential elements' of each charge." (*Lopez, supra*, 31 Cal.App.5th at p. 64 [distinguishing *Farwell* on same grounds].)

We also disagree the recent decision in *People v. Amezcua and Flores* (2019) 6 Cal.5th 886 (*Amezcua*) compels *Boykin-Tahl* waivers here. In that case, the defendants stated "repeatedly and emphatically" they did not want any defense presented in the penalty phase of their capital trial. (*Id.* at p. 920.) After holding an extensive hearing and obtaining express agreement from the defendants and counsel, the trial court allowed the penalty phase to proceed in accordance with the defendants' wishes. On appeal, the defendants claimed the court erred in allowing them to

override their counsel's efforts to present a penalty defense. (*Id.* at p. 925.)

The California Supreme Court rejected the claim, citing “[t]hirty years of precedent” holding “among the core of fundamental questions over which a represented defendant retains control is the decision whether or not to present a defense at the penalty phase of a capital trial, and the choice not to do so is not a denial of the right to counsel or a reliable penalty determination.” (*Amezcuca, supra*, 6 Cal.5th at p. 925.) For support, the court cited *McCoy* and explained: “The record clearly demonstrates defendants’ objective in this case. The court engaged in extensive and careful colloquy with defendants and their counsel to ensure that each defendant understood the stakes involved in pursuing his choice. It ensured each defendant had the benefit of the court’s own counsel, as well as that of his lawyers. It confirmed that both defense teams had prepared a case in mitigation and were ready to present it. It gave each defendant several opportunities to ask questions and to explain his choice in his own words. It expressed its own concerns for each defendant as an individual and for the preservation of each man’s procedural safeguards. The court interacted with each defendant directly and with courtesy. It took the same kind of care that is required when ensuring that the waiver of any substantial right is personally and properly made. It explicitly found that each defendant had made his own choice knowingly and voluntarily. The procedure employed here satisfied the state’s interest in assuring the fairness and accuracy of the death judgments consistently with *McCoy*.” (*Id.* at p. 926.)

Santana reads this passage to *require* a trial court to take knowing and voluntary waivers under *McCoy* “when a defendant

elects not to present an argument consistent with the normal defense goal of a not guilty verdict.” It is highly doubtful the court silently overruled *Cain* and the other cases cited above to impliedly hold that knowing and voluntary waivers are now required under *McCoy*. The court simply recognized the record in the case reflected extensive discussions of the defendants’ decisions, ensuring their choices in the case were, in fact, knowing and voluntary. In any event, even if this passage could be interpreted as Santana contends, the very first sentence distinguishes it, given the record here does *not* “clearly demonstrate[] [Santana’s] objective in this case.” (*Amezcu*, *supra*, 6 Cal.5th at p. 926.)

In sum, we find no violation of Santana’s Sixth Amendment right to counsel pursuant to *McCoy*.

II. Santana Forfeited His Objection to the Prosecution’s GSR Expert

Santana contends the trial court abused its discretion and violated his constitutional rights by admitting Fritz’s expert testimony on GSR. He did not object to the testimony in the trial court, so we find his argument forfeited.

Santana’s co-defendant Andres moved before trial to exclude Fritz’s expert testimony as unreliable, irrelevant, and unduly prejudicial because of the high likelihood of secondary transfer before his clothing was collected for GSR testing. Specifically, Andres argued his clothing was not collected until two days after he was arrested, which was seven days after the alleged shooting. During that time, he had ridden in Santana’s Mini Cooper, had ridden in the police van and other police vehicles, was pat-searched by multiple officers, and was transported to multiple detention facilities. He also requested

the court conduct a *Kelly*⁶ hearing to assess the methodology of GSR testing. Santana did not join this motion or raise any objection to Fritz's testimony.

At the hearing on the motion, Andres's counsel did not challenge Fritz's qualifications or methodology, but continued to focus on "the way the evidence was gathered." He argued transfer was likely due to how Andres's clothing was bagged. The court denied the motion because the issue of transfer was "going to be the jury's task to decide."

Santana's failure to object to Fritz's testimony at any point in the trial court or join in Andres's motion forfeits the issue on appeal. (*People v. Wilson* (2008) 44 Cal.4th 758, 793 ["'Generally, failure to join in the objection or motion of a codefendant constitutes a waiver of the issue on appeal.'"]). Santana argues his failure to object should be excused because any specific objection from him would have been futile, given the trial court denied Andres's motion. (See *ibid.* ["A litigant need not object, however, if doing so would be futile."]). We disagree. Andres's motion was based largely on the factually unique circumstances surrounding his arrest and processing in custody, which he argued created a high likelihood of GSR transfer. On appeal, Santana argues Fritz's testimony should have been excluded due to *his* factually specific circumstances surrounding his actions before the murder and his processing after arrest. Presumably the focus of his argument to the trial court would have also been his processing in the police environment, which would have raised unique factual questions about the likelihood of GSR transfer. By not raising the issue before now, he has forfeited it.

⁶ *People v. Kelly* (1976) 17 Cal.3d 24.

III. Sufficient Evidence Supported the Murder Court and Personal Use Firearm Enhancement

Santana contends insufficient evidence supported the jury's second-degree murder verdict and its findings that he personally used a firearm. We address the verdict and enhancements together because we find the evidence was sufficient to support the jury's implicit conclusion Santana murdered Salva by personally shooting her twice.

On review for sufficiency of the evidence, we “must determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*People v. Earp* (1999) 20 Cal.4th 826, 887.) Where the evidence is circumstantial, as was much of the evidence here, “we must decide whether the circumstances reasonably justify those findings, ‘but our opinion that the circumstances also might reasonably be reconciled with a contrary finding’ does not render the evidence insubstantial.” (*Id.* at pp. 887–888.)

The statements in the jail transport van among Santana, Andres, and Curiel strongly supported an inference that Santana was the shooter. He, Andres, and Curiel discussed getting rid of bullet casings hidden in Andres's sock, and Santana said, “I have *my* fingerprints on them. I'm gonna wipe 'em. Unless you get with the shirt, wipe them.” (*Italics added.*) Although the casings were hidden in Andres's sock, Andres never expressed any concern his fingerprints were also on them. Santana also said, “*We* shot it and then they found it, you think they'd (unintelligible),” to which Curiel responded, “I don't know why *you* shot it.” (*Italics added.*) Santana did not respond or correct her comment, strongly suggesting he pulled the trigger.

The evidence also supported an inference Santana's gun was the murder weapon. Less than two weeks before the murder, Daisy saw Santana place a black revolver with brown handgrips in a backpack worn by Andres. On October 7, 2014, Santana texted Andres the message, "Bring *my* piece," or gun, "from the side door driver side." (*Italics added.*) Santana's cell phone contained a photograph of a revolver in his Mini Cooper, which resembled the gun Daisy saw him place in Andres's backpack. The bullets recovered from Salva's body could have come from a Colt revolver, which was the type of gun in the photograph. The cartridge cases found in the police van were also consistent with the recovered bullets. There was also evidence Santana had previously fired a gun; there was no evidence that Andres or Curiel ever had.

Finally, the evidence of GSR and GSR-consistent particles on the clothing Santana was wearing the night of the murder supported an inference Santana was close to the gun when it discharged. Santana argues the jury could not rely on the GSR evidence to infer he was the shooter because GSR and GSR-consistent particles were also present on Andres's clothing. In his view, the GSR evidence gave rise to two equally plausible inferences—either Santana *or* Andres personally used the gun—so neither was established. (See *People v. Acevedo* (2003) 105 Cal.App.4th 195, 198 ["When the facts give equal support to two competing inferences, neither is established."].)

Santana misunderstands the significance of the GSR evidence in the case. He is correct Fritz opined only that Santana's clothes were in an environment of GSR. While Andres's defense expert testified to the possibility of secondary transfer, the jury could have accepted Fritz's testimony that the

incidence of secondary transfer is low. From that testimony, the jury could infer Santana was present when the gun was discharged. Coupling that inference with the incriminating statements from the police van and the evidence that the gun belonged to Santana, the jury could have reasonably concluded Santana was in fact the shooter.

For that reason, *People v. Botello* (2010) 183 Cal.App.4th 1014 is distinguishable. There, the court accepted respondent's concession that insufficient evidence supported personal firearm use enhancements because the only apparent witness to the shooting could not identify which of the two identical twin defendants was the shooter. (*Id.* at p. 1022.) Here, the GSR evidence was merely one link in the chain of evidence leading to a conclusion Santana was the shooter.

Other evidence supported the jury's murder verdict. For example, there was evidence of Santana's motive to commit the murder. The evening of the murder a neighbor observed tension and an argument between Salva and Curiel and a man whom the jury could have inferred was Santana, suggesting some animosity among the three. The evidence also showed a motive to kill Salva in order to steal money and valuables from her. Before the murder and burglary, Santana's employer had placed him on administrative leave. After the murder, he had paid only a bit more than a month's worth of child support. He had also repeatedly burglarized Salva's home, and a wide array of stolen items were recovered, from savings bonds and cash to jewelry and a television. Given Santana, Andres, and Curiel most likely had to spend some time ransacking Salva's home to find and remove those items, her murder would have facilitated the thefts without interference.

Also, the text messages and other information recovered from the perpetrators' cell phones showed Santana attempted to cover up the murder and directed Andres to find someone to cash Salva's checks in order to capitalize on the crimes. When one individual declined to help cash the checks, Andres responded, "That's fine. I'll let him know. . . . In all honesty, this is some sketchy stuff and I wouldn't recommend you do anything my father asks." Andres also texted Curiel on the day of the murder to say, "Father said to turn off GPS things on the phone and iPod," and the message was later deleted. Two days after the murder, Santana searched for Salva's son "Luciano Salva" on his phone. One of the phones also had a text message from the same day reading, "Tell Andre the gun is under his seat," which was later deleted.

In the police van, the three discussed deleting incriminating information on their cell phones and coordinating stories about how they obtained the television and how they had two money orders for \$1,000 that "didn't work." Santana also directed the others, "Deny, deny, deny."

Santana cites two cases to support his argument this evidence was insufficient, but both found insufficient evidence in the unique, detailed factual circumstances present in each case and not present here. In *People v. Lara* (2017) 9 Cal.App.5th 296 (*Lara*), sufficient evidence showed the defendant aided and abetted an assault with a firearm, but the court found only suspicion supported a finding he had pulled the trigger or willfully aided and abetted murder of the victim, which took place after the assault and after the victim was dragged to another area. (*Id.* at pp. 319–320.) In the "unusual circumstances" of *People v. Sanford* (2017) 11 Cal.App.5th 84 (*Sanford*), the court

found insufficient evidence of robbery when the only evidence linking the defendant to the crime was his presence in one of two getaway cars, and uncontroverted evidence showed at least one car's occupants had changed after the robbery but before being located by police. (*Id.* at pp. 85–86.) For the reasons already explained, the evidence here was sufficient to show Santana murdered Salva by shooting her, distinguishing this case from *Lara* and *Sanford*.

Thus, the jury could have reasonably concluded beyond a reasonable doubt that Santana murdered Salva by shooting her twice, which satisfied the second-degree murder verdict and personal use firearm enhancements.

IV. The Trial Court Did Not Abuse Its Discretion in Investigating Juror Concerns About Being Photographed

During trial, a juror and an alternate juror each raised an issue that Santana's family members were taking photographs of members of the jury. Santana argues the trial court violated his right to a fair trial by failing to inquire whether the jury's impartiality had been affected. The claim lacks merit.

The issue arose when the prosecutor informed the court and defense counsel that Juror No. 10 approached the investigating officer to express concern that some of Santana's family members were taking photographs of jurors. The court clerk then reported a second juror approached court staff about the same issue. The court inquired who was in the courtroom at the time, and it was determined that several of Santana's family members were there. Neither counsel requested further questioning of the jurors.

The following morning, the court questioned Santana's son whether he had been wearing a Raiders shirt the previous day. He said no and did not know who was wearing one.

At the end of that day, the court addressed the photographing issue: "Also, there was some concern about whether someone was trying to record, video-record, or photograph individuals in the courtroom yesterday; and I received communications from two jurors about that concern. Actually, I received information from a member of the clerk's office. In any event, I prepared a note that was delivered to each of the two identified jurors yesterday, and that note reads as follows:

"(Reading:)

"The court is currently looking into your concern about possible photographing of jurors. Please do not share your concerns with any other jurors or persons. Should you see the individual or individuals again, please write a note and give it to the bailiff or the clerk. Please also provide a note of the physical or clothing description of that person.

"I will make these available to counsel to view, and it will be part of the record."

The court also informed counsel it had received a "follow-up" from one of the jurors who had expressed the concerns, and the court would make that note available to counsel and sealed. The note described the incident and the individual taking the photographs, and the juror indicated the individual did not return after the noon recess. Again, neither party requested that the court question the juror or take any further action.

Following closing argument, the court questioned Juror No. 10 outside the presence of the other jurors. The court told

Juror No. 10, “I just wanted to inquire whether your concern of a few days ago has interfered with your ability to be objective in this matter.” Juror No. 10 replied, “No, not at all.” The court continued, “We have not been able to verify the concern and whether it was an actuality or not; but, again, we just want to otherwise reassure ourselves that it hasn’t caused or created compromise in you in terms of being a juror and being objective and making the decision according to the law and according to the evidence.” Juror No. 10 responded, “No, it has not.” The court asked if either counsel wished to inquire, and neither did.

As the bailiff took charge of the jury, the court and counsel decided the replacement of jurors with alternates would be random. It was apparently determined off the record the juror who wrote the note about the photographing incident was Alternate Juror No. 3. The parties stipulated Alternate Juror No. 3 would only be selected as a juror of last resort.

“Section 1089 provides in part: ‘If at any time . . . a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror be discharged’ In construing this statute, we have held that ‘[o]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court’s duty ‘to make whatever inquiry is reasonably necessary’ to determine whether the juror should be discharged.” ’ ” (*People v. Martinez* (2010) 47 Cal.4th 911, 941–942 (*Martinez*).)

However, “ ‘not every incident involving a juror’s conduct requires or warrants further investigation. ‘The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a

juror—rests within the sound discretion of the trial court.”’
[Citation.] ‘ “[A] hearing is required only where the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his duties and would justify his removal from the case.”’ [Citation.]” (*Martinez, supra*, 47 Cal.4th at p. 942.) Importantly, “[t]he court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.’” (*Ibid.*)

In his opening brief, Santana argues the court was alerted to the possibility jurors were being photographed but “conducted zero inquiry into the matter.” He is mistaken, as he concedes in his reply brief. He shifts his argument to contend the inquiry the court made was inadequate. We find no abuse of discretion.

When alerted, the court sent a note to the two jurors who expressed concerns and assured them the court was looking into the matter. The court also admonished them not to discuss the issue with other jurors. Later, the court confirmed through questioning on the record that Juror No. 10 was unaffected by the incident and could be impartial. While Santana faults the court for not asking if Juror No. 10 shared the information with other jurors, nothing in the record suggested that was a concern; to the contrary, Juror No. 10 was admonished in the court’s earlier note not to share it. Both counsel appeared satisfied with the court’s inquiry and opted not to question the juror further. As for Alternate Juror No. 3, the court and parties agreed to use that juror as last resort, and neither party suggests the juror was seated. On this record, the trial court’s response to the issue was proper and no further inquiry was required.

V. Santana's Challenge to the Fines and Fees Fails

At sentencing, Santana was assessed a \$5,000 restitution fine (§ 1202.4), a stayed \$5,000 parole revocation fine (§ 1202.45), a \$120 court operations assessment (§ 1465.8), and a \$90 court facilities assessment (Gov. Code, § 70373). Relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157, Santana argues these fines and fees must be reversed on due process grounds and his case remanded for a determination of his ability to pay. He did not raise this issue in the trial court. For the reasons set forth in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*), we find the issue forfeited. (See *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [citing *Frandsen* to find *Dueñas* issue forfeited for failure to object in trial court].)⁷

We also reject Santana's alternative claim his counsel was ineffective for failing to raise the issue in the trial court. He has not shown prejudice. (*Frandsen*, *supra*, 33 Cal.App.5th at pp. 1150–1151 [defendant must show both ineffective assistance and prejudice].) Nothing in the record indicates the court would have found him unable to pay the fines and fees had the issue been raised. Although Santana claims without analysis or citation to authority that the court "likely" would have found him unable to pay because he used appointed counsel, the ability-to-pay standard for appointing counsel may well be different than the standard for imposing fines and fees. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 [identifying different standards

⁷ *Dueñas* did not address the imposition of a suspended parole revocation fine pursuant to section 1202.45. Santana appears to direct his ability-to-pay challenge to that fine as well, but does not raise any distinct argument. We decline to separately consider it and find the challenge forfeited.

for appointing counsel and paying restitution fine and concluding “a defendant may lack the ‘ability to pay’ the costs of court-appointed counsel yet have the ‘ability to pay’ a restitution fine”].) Santana has not adequately developed or supported this argument with authority, so we reject it. (Cal. Rules of Court, rules 8.204(a)(1)(B), 8.360(a).)

Even if we considered the merits of his claim, we would reject it. Again, nothing in the record supports the contention that the imposition of the fines and fees here was fundamentally unfair to Santana or violated due process. The facts here bear no similarity to the unique factual circumstances presented in *Dueñas*. In a probation report prepared before sentencing, Santana was given notice that fees and a restitution fine would be imposed. He was present at the sentencing hearing with his counsel when the court sentenced him to 43 years to life and imposed the now-challenged fines and fees pursuant to clear statutory authority. In the absence of an objection by Santana, the trial court could presume the assessments and fine would be paid out of his future prison wages. (See *People v. Johnson* (2019) 35 Cal.App.5th 134,132–140; see also *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) Defendant has not articulated any basis for finding prejudice or a due process violation.

VI. Remand for Resentencing Is Proper for the Firearm Enhancements

Santana seeks remand for resentencing in light of Senate Bill No. 620, effective January 1, 2018, which amended sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to give the trial court discretion whether to strike previously mandatory firearm enhancements. (§ 12022.5, subd. (c) [“The court may, in the interest of justice pursuant to Section 1385 and at the time of

sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”]; § 12022.53, subd. (h) [same].)

The discretion to strike a firearm enhancement may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Because Santana’s conviction was not final when Senate Bill No. 620 went into effect, respondent agrees that remand is proper, as do we. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305 [“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 [“[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired”]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 [“[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it”].)

On remand, the court may exercise its discretion under section 12022.53, subdivision (h), to strike all of the firearm enhancements under that provision or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subs. (f) & (h).) For example, the court may choose to impose the 25-year-to-life enhancement under section 12022.53, subdivision (d). If so, it

should impose and stay the enhancements under section 12022.53, subdivisions (c) and (b). If the court imposes the 20-year enhancement under section 12022.53, subdivision (c), it must then strike the 25-year-to-life enhancement under section 12022.53, subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) “In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant’s criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration.” (Cal. Rules of Court, rule 4.428(b).)

DISPOSITION

The matter is remanded for resentencing for the trial court to consider striking the firearm enhancements. In all other respects, the judgment is affirmed.

The petition for writ of habeas corpus is denied.

BIGELOW, P. J.

We concur:

GRIMES, J.

STRATTON, J.